

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

ELK GROVE UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2014100698

ORDER FOLLOWING PREHEARING
CONFERENCE

On March 6 and 9, 2015, a telephonic prehearing conference (PHC) was held before Administrative Law Judge Rebecca Freie, Office of Administrative Hearings.¹ James Peters, advocate, and Guy Leemhuis, Attorney at Law, appeared on behalf of Student. Lauri Arrowsmith, Attorney at Law, appeared on behalf of Elk Grove Unified School District (Elk Grove). The PHC was recorded.

Based on discussion of the parties, the ALJ issues the following orders:

1. Hearing Dates, Times, and Location. The hearing shall occur on March 17 through March 20, 2015, and March 23 and 24, 2015, and continue day to day, Monday through Thursday as needed at the discretion of the ALJ.² The hearing shall take place at Elk Grove's administrative offices at 9510 Elk Grove-Florin Road, Elk Grove, California, 95624, beginning at 9:30 a.m. on March 17 and 23, 2015, and at 9:00 a.m. on all other days. The hearing shall end at 5:00 p.m. each day.

At a minimum, the hearing room shall have four or more separate tables capable of being moved into a courtroom configuration with an electrical outlet near the ALJ's table. Elk Grove shall ensure that all parties and the ALJ have drinking water, and that tissue is available on the witness table during the hearing. Elk Grove shall ensure that the facility for the hearing fully complies with the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.), the Rehabilitation Act of 1973 (29 U.S.C. § 794), the Unruh Civil Rights Act

¹ Due to time constraints the PHC could not be completed on March 6, 2015.

² Although OAH does not usually hold hearings on Friday, and March 20, 2015 is a Friday, the undersigned ALJ is willing to hold this hearing on Friday in order that the hearing may end sooner. However, if another ALJ is assigned to do the hearing in this case, that ALJ may vacate the Friday hearing date. .

(Civ. Code, § 51 et seq.), and all laws governing accessibility of government facilities to persons with disabilities.

The parties shall immediately notify all potential witnesses of the hearing dates, and shall subpoena witnesses if necessary, to ensure that the witnesses will be available to testify. A witness will not be regarded as unavailable for purposes of showing “good cause” to continue the hearing if the witness is not properly notified of the hearing date or properly subpoenaed, as applicable.

Issues. The issues at the due process hearing are listed below.

a) Did Elk Grove deny Student a free appropriate public education by failing to offer and/or provide him with an interim individualized education program offer of program and services comparable to those in an IEP from the Fullerton Unified School District when Student first enrolled in Elk Grove in September 2014?^[1]

b) Did Elk Grove commit a procedural violation which denied Student a FAPE by causing a deprivation of educational benefit, or significantly impeded Parent’s meaningful participation in the IEP development process by

1) failing to include Parent in discussions concerning Student’s interim IEP following his enrollment in Elk Grove?

2) failing to notify Parent of IEP team meetings on October 1, and October 17, 2014?

3) failing to hold a timely IEP team meeting that met all legal requirements to develop Student’s IEP for the 2014-2015 school year within 30 days of Student’s entrance into Elk Grove?

c) Did Elk Grove deny Student a substantive FAPE by failing to create an IEP for the 2014-2015 school year that would meet his unique needs and provide him with educational benefit?

3. Exhibits. Exhibits shall be pre-marked and placed in three-ring exhibit binders prior to the hearing, with each exhibit separated from the next by a divider. It is suggested, but not ordered, that the parties use different colored binders for ease of use by witnesses when testifying. The parties shall use numbers to identify exhibits. At the hearing the ALJ shall place the letter “S” or “D” in front of an offered or admitted exhibit, or an exhibit referred to by a witness, to designate if it is a Student or District exhibit (for example, “S-5, S-6, or D-1, D-2”). Each exhibit shall be internally paginated by exhibit, or all of a

^[1] There is a factual dispute between the parties as to the exact date of enrollment. The ALJ shall make a factual finding as to the date of enrollment prior to deciding whether the District made a comparable interim placement.

party's exhibits shall be consecutively numbered or Bates-stamped. Each exhibit binder shall contain a detailed table of contents. At the hearing, each party shall supply an exhibit binder containing its exhibits for use by the ALJ, and a second exhibit binder for use by witnesses. The parties must serve each other with the exhibit binders at least five business days before the commencement of the due process hearing unless they agree to a shorter time for the exchange. The parties may not serve exhibits on OAH prior to the hearing. In the event of duplicate exhibits, the most legible version will be used. The parties are asked, but not ordered, to provide curricula vitae or resumes for witnesses testifying in their professional capacity, such as teachers.

Inclusion of an exhibit in an exhibit binder, or presentation of an exhibit to the other side according to the agreed upon timeline, does not guarantee the admission of an exhibit. The ALJ shall determine whether the exhibit is relevant and admissible. Parties shall be prepared to make an "offer of proof" to the ALJ at hearing as to the admissibility of an exhibit.

Except for good cause shown, or unless used solely for rebuttal or impeachment, any exhibit not included in the exhibit lists and not previously exchanged shall not be admitted into evidence at the hearing unless it is supported by written declaration under penalty of perjury, and the ALJ rules that it is admissible. The parties have agreed that curricula vitae or resumes are not included as exhibits subject to this order.

4. Witnesses. Each party is responsible for procuring the attendance at hearing of its own witnesses. Each party shall make witnesses under its control reasonably available. The parties shall schedule their witnesses to avoid delays in the hearing and to minimize or eliminate the need for calling witnesses out of order. Neither party shall be permitted to call any witnesses not disclosed in the party's prehearing conference statement except for good cause shown, supported by written declaration under penalty of perjury, and at the discretion of the ALJ.

The parties are ordered to meet and confer by 5:00 p.m. on March 12, 2015, as to the schedule of witnesses. The parties shall ensure that there is a witness available to testify at all times during the hearing, so that the hearing is completed as scheduled. The parties shall attempt to reach agreement on a witness list for the first day of hearing. Elk Grove shall have witnesses available in case agreement on a witness list is not reached. The parties shall be prepared at the end of each day of hearing to discuss the witnesses to be presented the next day and the time the testimony of each such witness is expected to take.

Prior to the commencement of the due process hearing, the ALJ and the parties will discuss the length of time anticipated for cross-examination of each witness and scheduling issues for individual witnesses, and the ALJ will finalize the witness schedule, subject to modifications during the due process hearing. The ALJ has discretion to limit the number of witnesses who testify and the time allowed for witnesses' testimony. Inclusion of a witness on a parties witness list does not ensure the testimony of a witness. Evidence will be excluded if it is repetitive, cumulative, or insufficiently probative to justify the time it would

take to hear. The parties shall be prepared to make an offer of proof as to the testimony of each witness, so that the ALJ has sufficient information to determine whether a witness shall be heard.

5. Scope of Witness Examination. If a witness is to be called by more than one party, the second party questioning the witness may expand cross-examination to include questions that might have been asked on direct examination had the party called the witness first. After the first direct and cross-examinations, each party shall be limited in examining the witness to only those matters raised in the immediately preceding examination.

6. Telephonic Testimony. Whether a witness may appear by telephone is a matter within the discretion of the ALJ. Cal. Code Regs., tit. 5, § 3082, subd. (g). Any party seeking to present a witness by telephone shall move in advance for leave to do so. The proponent of the witness shall provide the proposed witness with a complete set of exhibit binders from all parties, containing all of each party's exhibits, prior to the hearing; and shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings. No witness will be heard by telephone unless all these requirements have been fulfilled.

Student's motion to allow Parent to testify telephonically is granted. Elk Grove's objection is noted for the record. Other witnesses who reside and work in Southern California shall also be allowed to testify telephonically. Student shall provide the witnesses who are testifying telephonically with a complete exhibit binder from each party, containing all of each party's exhibits, prior to the hearing. Student shall ensure that the hearing room has sound equipment that allows everyone in the room to hear the witness, and the witness to hear objections and rulings.

7. Timely Disclosure of Witnesses and Exhibits. Education Code section 56505, subdivision (e)(7), provides for disclosure of witnesses and exhibits "at least" five business days prior to the hearing. The Parties shall exchange evidence binders and any updated witness lists within this timeframe, unless they mutually agree to a later exchange date

8. Order of Presentation of Evidence. The order of presentation of evidence shall be as follows: Student shall present his evidence first. However, to avoid the need of recalling witnesses, if a witness is to testify for both parties, the second party questioning the witness may increase the first cross examination to include questions that would have been posed during that party's direct examination.

9. Motions. Student filed two motions prior to the commencement of the PHC, and argument was heard on both. In regards to a request that Parent testify telephonically, which Elk Grove objected to, OAH is granting that request. If Student can arrange for some sort of video-conferencing for the presentation of this testimony, it is suggested that he do so. Parent shall testify outside the presence of Student.

Student also requested that he be allowed to video record the proceedings, and indicated that a news network might be interested in doing so. Because Student could not provide information as to what type of equipment and lighting would be used, or who would be doing the recording, the motion is denied without prejudice.

Elk Grove may file a motion or motions to quash subpoenas. No other pretrial motions are pending or contemplated. Any motion filed after this date, other than Elk Grove's possible motion/s to quash, shall be supported by a declaration under penalty of perjury establishing good cause as to why the motion was not made prior to or during the prehearing conference on March 6 and 9, 2015.

10. Stipulations. Stipulations to pertinent facts, contentions or resolutions are encouraged. Any proposed stipulation shall be submitted to the assigned ALJ in written form.

11. Conduct of Counsel and Hearing Room Decorum. Counsel, all parties, and all witnesses shall conduct themselves in a professional and courteous manner at all times. Cellular phones, pagers, recorders, and other noisemaking electronic devices shall be shut off

12. Audio Recording of the Hearing. It is within the discretion of the ALJ to permit the audio recording of a due process hearing. The ALJ has informed the parties that they may record the hearing. However, the parties are advised that OAH always makes a digital recording of the proceedings, and this recording is the official record of the hearing. Parties who record the hearing are to turn off their recorders whenever the ALJ orders that the hearing is "off the record." Any violation of this order to turn off recorders when the matter goes off the record will result in the revocation of permission to record the hearing, unless permission to the contrary is obtained from the ALJ.

13. Compensatory Education/Reimbursement. Any party seeking reimbursement of expenditures shall present admissible evidence of these expenditures, or a stipulation to the amount of expenditures, as part of its case in chief. A party seeking compensatory education should provide evidence regarding the type, amount, duration, and need for any requested compensatory education.

14. Special Needs and Accommodations. Parent shall be permitted to testify telephonically.. No interpreter services are contemplated.

15. Hearing Open/Closed To the Public. At the request of Parent, the hearing will be open to the public.

16. Settlement. The parties are encouraged to continue working together to reach an agreement before the due process hearing. The parties shall inform OAH in writing immediately should they reach a settlement or otherwise resolve the dispute before the scheduled hearing. In addition, if a settlement is reached within five days of the

scheduled start of the due process hearing, the parties shall also inform OAH of the settlement by telephone at (916) 263-0880.

IF A FULL AND FINAL WRITTEN SETTLEMENT AGREEMENT IS REACHED AFTER NOON ON MARCH 16, 2015, THE PARTIES SHALL LEAVE A VOICEMAIL MESSAGE REGARDING THE SETTLEMENT AT (916) 274-6035. THE PARTIES SHOULD ALSO LEAVE CONTACT INFORMATION SUCH AS CELLULAR PHONE NUMBERS OF EACH PARTY OR COUNSEL FOR EACH PARTY. THE PARTIES SHOULD SIMULTANEOUSLY FAX THE SIGNATURE PAGE OF THE SIGNED AGREEMENT OR A LETTER WITHDRAWING THE CASE TO THE OAH AT THE FAXINATION LINE AT 916-376-6319.

Dates for hearing will not be cancelled until the letter of withdrawal or signature page of the signed agreement has been received by OAH. If an agreement in principle is reached, the parties should plan to attend the scheduled hearing unless different arrangements have been agreed upon by the assigned ALJ. The assigned ALJ will check for messages the evening prior to the hearing or the morning of the hearing.

17. Failure to comply with this order may result in the exclusion of evidence or other sanctions.

IT IS SO ORDERED.

DATE: March 10, 2015

/s/
REBECCA FREIE
Administrative Law Judge
Office of Administrative Hearings